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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 811.

WILLIAM J. LUDWIG,
Appellant,

vs.

AMERICAN GREETINGS CORPORATION,
Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

MOTION TO DISMISS.

ROBERT W. POORE,
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Appellee, pursuant to Rule 16 1. (a) of the Revised Rules of the Supreme Court of the United States, moves that this appeal be dismissed on the ground that it is not within the jurisdiction of this Court.

MEMORANDUM IN SUPPORT OF MOTION.

An appeal from a Federal Court of Appeals lies only under 28 U. S. C. §§ 1252 and 1254(2). Before an appeal will lie under those sections, however, either an Act of Congress must have been held unconstitutional or a State statute must have been held invalid as repugnant to Federal law. Manifestly, neither of those jurisdictional prerequisites exists in this case. Accordingly, this Court is without jurisdiction and the appeal must be dismissed.

Appellant suggests in his Jurisdictional Statement that this Court has jurisdiction to review the judgment below by certiorari under 28 U. S. C. § 1254(1). Congress has provided, however, in 28 U. S. C. § 2101(c) that any

such petition for a writ of certiorari must be applied for within ninety days after entry of the judgment below. This requirement is jurisdictional. E.g., *Toledo Scale Co. v. Computing Scale Co.*, 261 U. S. 399 at 418 (1923).

The final judgment in this case was entered on November 29, 1960 as appellant admits. Appellant therefore had until February 27, 1961 to file a petition for a writ of certiorari since no extension of time was granted. The Jurisdictional Statement was filed in this Court on March 14, 1961, well after expiration of the statutory period. It is therefore out of time as a petition for a writ of certiorari and the Court has no jurisdiction to consider it as such. The statute, 28 U. S. C. § 2103, permitting an improvident, but timely, appeal from a State court to be treated as a "duly presented" petition for a writ of certiorari has no counterpart applicable to improvident appeals from Federal courts.

The appeal must be dismissed.

Respectfully submitted,

ROBERT W. POORE,

Attorney for Appellee.

JAMES T. LYNN,
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Of Counsel.

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